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No. 82-74

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARVIN S. ANTELMAN, PETITIONER

v.

MICHAEL DECATALDO, REVENUE AGENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In this Internal Revenue Service summons enforcement case, petitioner seeks review of the orders of the courts below denying intervention and refusing to quash the summons retroactively.

1. As part of an investigation into the income tax liabilities of Tivian Laboratories, Inc., respondent Revenue Agent Michael DeCataldo issued an Internal Revenue Service summons to respondents Industrial National Bank and Assistant Manager Kathy Lawson seeking all records in their possession relating to financial transactions in the name of Tivian Laboratories, Inc., and of a separate but related company known as Tivian Laboratories Co. d/b/a Tilaco Chemicals, LTD. After a hearing, the district court, on December 30, 1980, ordered enforcement of the summons (Pet. App. 25).

Thereafter, on April 16, 1981, petitioner moved to intervene in the proceedings in the district court on the ground that he was a shareholder and president of Tilaco Chemicals LTD. Petitioner also alleged that the summons was issued to examine the corporate records for the purpose of reviewing his own transactions with the corporations and that he was the subject of a criminal investigation by the Internal Revenue Service. Petitioner moved for a writ of injunction aimed at setting aside the summons. He also moved to compel discovery and to quash the summons. See Pet. App. 23. The district court denied the motion to intervene on the ground that the matter was res judicata. *Ibid.* The district court also denied petitioner's other post-judgment motions.

The court of appeals affirmed the district court's holding that petitioner's alleged status as a shareholder and corporate officer of Tilaco Chemicals, LTD. did not entitle him to intervene in the summons enforcement proceedings. The court of appeals also held that, with respect to his claim that he was the subject of a criminal investigation, petitioner had failed to carry the burden of demonstrating bad faith on the part of the Internal Revenue Service and that he had no right to intervene, or to the other relief sought (Pet. App. 23-24).[1]

2. The court of appeals correctly affirmed the orders of the district court. Subsequent to an order of enforcement and beyond the time for appealing that order, petitioner sought to intervene to oppose enforcement of the summons, asserting grounds of abuse of judicial process and violation

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[1]Because petitioner's notice of appeal was filed beyond the time for appealing the order of enforcement, the court of appeals had no jurisdiction to consider petitioner's challenge to that order; the only issue before the court was whether the district court properly denied petitioner's post-judgment motions (Pet. App. 24 n.*).

of his constitutional rights. Petitioner's post-judgment motions were filed pursuant to Rules 60(b)(2) and 60(b)(3) of the Federal Rules of Civil Procedure. Such motions may be granted where a party presents newly discovered evidence or establishes that there was fraud or other misconduct of an adverse party that prevented the moving party from fully and fairly presenting his case. Neither of these conditions was met here. Accordingly, the district court clearly acted within its discretion in denying the motions. See, *e.g.*, *Jafree* v. *Scott*, 590 F. 2d 209, 212 (7th Cir. 1978); *Williams* v. *United States*, 577 F. 2d 930 (5th Cir. 1978); *Altman* v. *Connally*, 456 F. 2d 1114 (2d Cir. 1972).

Petitioner's assertions (Pet. 11-21) of violations of his constitutional rights are based upon his claim that alleged actions by the Internal Revenue Service, occurring subsequent to the order of enforcement, demonstrated the bad faith of the Internal Revenue Service. Petitioner offered no evidence whatsoever to support his allegations and thus the court of appeals correctly found that petitioner failed to demonstrate bad faith (Pet. App. 23-24). The summons was issued and served on the respondent bank seeking information concerning the civil income tax liability of the taxpayer corporation. No individuals were named as taxpayers. Indeed, there is no evidence in the record of any investigation, criminal or otherwise, into the personal tax liabilities of the petitioner. In short, petitioner has wholly failed to show any legally supportable justification for his attempted post-judgment intervention below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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